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**LAZ PARKING’S MOTION TO CLARIFY, TO STRIKE AND TO CONTINUE
GENERALLY THE HEARING ON COMED’S AMENDED MOTION TO DISMISS**

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LAZ PARKING LTD, LLC

Petitioner,

and

COMMONWEALTH EDISON COMPANY

Respondent.

Docket No. 12-0324

**LAZ PARKING'S MOTION TO CLARIFY, TO STRIKE AND TO CONTINUE
GENERALLY THE HEARING ON COMED'S AMENDED MOTION TO DISMISS**

I. Introduction

A. Background

On May 2, 2012, LAZ Parking LTD LLC (“LAZ Parking”) filed its complaint (the “Complaint”) against Commonwealth Edison Company (“ComEd”) to recover \$259,938 wrongfully back-billed to LAZ Parking by ComEd. The Complaint as originally filed stated five counts. ComEd claimed that LAZ parking had been billed with an incorrect meter constant, resulting in alleged under-billing of LAZ Parking’s account. (Complaint, Exhibit D). However, ComEd failed to comply with the accuracy and testing requirements set forth in Part 410 of the Rules of the Illinois Commerce Commission (the “Commission”), and therefore ComEd’s adjustment of its bills to LAZ Parking is unlawful under 83 Ill. Adm. Code Section 410.200(h)(1). (Complaint, Count II).

LAZ Parking served ComEd with discovery in July 2012. LAZ Parking had issues with ComEd's responses to discovery, and, pursuant to Supreme Court Rule 201(k) and Commission Rule 200.350, from August through early October 2012 LAZ Parking repeatedly requested ComEd to schedule a telephone conference to discuss these discovery issues. ComEd uniformly ignored each of these requests. (*See* LAZ Parking's Reply in Support of Motion to Deem Admitted, Exhibits A through D).

On October 5, 2012, LAZ Parking served ComEd with its First Set of Requests for Admission (the “Requests for Admission”). On October 31, 2012, ComEd served on LAZ

Parking its responses to the Requests for Admission. On November 12, 2012, LAZ Parking filed its Motion to Deem Admitted Certain Facts Pursuant to Requests for Admission and Responses Thereto (the “Motion to Deem Admitted”), a copy of which is attached as Exhibit A to this Motion. Only after LAZ Parking filed the Motion to Deem Admitted did ComEd agree to confer with LAZ Parking by telephone regarding discovery issues (November 16, 2012). ComEd filed its Response in Opposition to LAZ Parking’s Motion to Deem Admitted on December 17, 2012.

On June 10, 2013, ComEd filed its “Motion to Dismiss Complaint on the Merits” (ComEd’s “Original Motion to Dismiss”).

On June 13, 2013, the Administrative Law Judge (the “ALJ”) ruled that ComEd’s Original Motion to Dismiss would be held in abeyance pending resolution of LAZ Parking’s Motion to Deem Admitted.

Oral argument on the Motion to Deem Admitted was held on June 28, 2013.

At a status hearing held on December 4, 2013, Complainant moved to voluntarily dismiss Counts I, III and IV from the Complaint. Counts II and V remain.

On February 13, 2014, the ALJ issued a ruling granting LAZ Parking’s Motion to Deem Admitted, a copy of which is attached as Exhibit A hereto.

On February 14, 2014 LAZ Parking filed its Motion to Strike ComEd’s Original Motion to Dismiss. On February 20, 2014, the ALJ struck the briefing schedule on ComEd’s Original Motion to Dismiss pending resolution of the Motion to Strike ComEd’s Original Motion to Dismiss.

On February 27, 2014, ComEd filed its Motion to Reconsider ALJ Ruling of February 13, 2014 (ComEd’s “Motion to Reconsider”). On February 28, 2014, the ALJ issued a ruling holding in abeyance the briefing schedule on the Motion to Strike ComEd’s Original Motion to Dismiss and establishing a briefing schedule on ComEd’s Motion to Reconsider, which was subsequently fully briefed.

On March 9, 2015, the ALJ entered an order denying ComEd’s Motion to Reconsider and granting ComEd leave to file an amended motion to dismiss. On April 30, 2015 ComEd filed its Amended Motion to Dismiss on the Merits (the “Amended Motion to Dismiss”).

B. ComEd's Amended Motion to Dismiss

ComEd's Amended Motion to Dismiss is riddled with legal deficiencies that make it impossible for LAZ Parking to determine what it is being asked to respond to. In addition, both ComEd's Amended Motion to Dismiss and its supporting affidavits seek to re-litigate ComEd's judicial admissions under Supreme Court Rule 216, notwithstanding the resolution of ComEd's prior challenges to these admissions in both the Motion to Deem Admitted (which included extensive oral argument by ComEd) and ComEd's Motion to Reconsider. As the Commission saw in connection with ComEd's arguments on the Motion to Deem Admitted, ComEd once again displays its proclivity for writing its own procedural rules, regardless of what the Commission, the Illinois General Assembly or the Illinois Supreme Court might have to say on the matter through statutes or procedural rules.

Because ComEd's Amended Motion to Dismiss is in material respects legally unintelligible, violates applicable Illinois Supreme Court Rules, and amounts to an attempt by ComEd to re-litigate its judicial admissions, LAZ Parking moves the Commission for an order to clarify ComEd's Amended Motion to Dismiss, to strike portions of ComEd's Amended Motion to Dismiss together with all or portions of ComEd's supporting affidavits, to direct ComEd to file an amended motion to dismiss that remedies these deficiencies, to make an offer of proof regarding the expected statements of its affiants stating why such affiants' statements are not cumulative or irrelevant, to continue generally the hearing on ComEd's Amended Motion to Dismiss pending the resolution of the issues raised by this Motion, and for such other relief as the Commission deems just and proper.

II. Motion to Clarify

By its Amended Motion to Dismiss ComEd seeks to involuntarily dismiss LAZ Parking's cause of action, without trial, without cross-examination, on the merits and with prejudice. (Amended Motion to Dismiss, pg. 2). Beyond any question of compliance with Illinois procedural law regarding a dispositive motion such as this, fundamental fairness and basic due process require that LAZ Parking, as the non-movant, be told what, exactly, it is being asked to

respond to. ComEd's Amended Motion to Dismiss utterly fails to perform this most simple of tasks.

ComEd's Amended Motion to Dismiss is a hybrid motion¹ that fails to state whether it is a motion to dismiss under 735 ILCS 5/2-615 ("2-615") or a motion for summary judgment under 735 ILCS 5/2-1005 ("2-1005").

A. ComEd's Amended Motion to Dismiss Fails to Make Clear Whether it is a 2-615 Motion

ComEd claims that the Complaint "...tries to allege meter error. But it pleads no facts. Its complaint is wholly unsupported. Simply put, [LAZ Parking's] Complaint is based on nothing more than mere speculation." (Amended Motion to Dismiss, pg. 2).

By these assertions ComEd appears to be claiming that the Complaint lacks sufficient facts that, if proved, would entitle LAZ Parking to relief. This would be an attack on the legal sufficiency of the Complaint, which would make ComEd's motion one to dismiss under 2-615. *Barber-Coleman v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1069 (5th Dist. 1992).

However, if ComEd's Amended Motion to Dismiss is a motion to dismiss under 2-615, then ComEd must admit for purposes of its motion all well-pled facts, and its motion may attack only the legal sufficiency of the Complaint. *Jenkins v. Concorde Acceptance Corp.*, 802 N.E.2d 1270, 1275, 280 Ill. Dec. 749, 754, 345 Ill. App.3d 669, 674 (Ill. App. 1st Dist., 2003).

Far from accepting as true for purposes of its motion all well-pled facts in the Complaint, ComEd doesn't even bother to specify the grounds on which it considers any fact in the Complaint not well-pled. Instead, ComEd simply denies all of them or discounts them as mere speculation by LAZ Parking. Furthermore, ComEd attempts to buttress its claims through the submission of five affidavits and exhibits to those affidavits.

If ComEd is making a 2-615 motion, then it must limit itself to the face of the pleadings and may not submit or use any affidavits, any products of discovery, any documentary evidence

¹A "hybrid" motion to dismiss is not the same as a "combined" motion to dismiss; see the discussion of 735 ILCS 5/2-619.1 below.

not incorporated into the Complaint as exhibits, any testimonial evidence or other evidentiary materials, and none of these may be considered by the Commission in ruling on ComEd's Amended Motion to Dismiss. *Baughman v. Martindale-Hubbell, Inc.*, 472 N.E.2d 582, 584, 84 Ill. Dec. 622, 624, 129 Ill. App.3d 506, 509 (Ill. App. 4th Dist. 1984) (under 2-615 the court may consider only the allegations of the complaint and may not consider supporting affidavits offered by the movant); *Saletech, LLC v. East Balt, Inc.*, 20 N.E.3d 796, 803, 386 Ill. Dec. 420, 427, 2014 IL App (1st) 132639, ¶ 11 (Ill. App. 1st Dist. 2014) (in ruling on a section 2-615 motion, the court may not consider affidavits, products of discovery, documentary evidence not incorporated into the pleadings as exhibits, or other evidentiary materials).

Accordingly, if ComEd's Amended Motion to Dismiss is a 2-615 motion, then all of the affidavits and any other evidentiary reference outside the Complaint must be stricken.

B. ComEd's Amended Motion to Dismiss Fails to Make Clear Whether it is a 2-1005 Motion

If ComEd intends its Amended Motion to Dismiss as an attack on matters not apparent on the face of the pleadings and wants the ALJ to consider other facts to decide its motion, then a motion for summary judgment under 2-1005 is the appropriate tool. *Barber-Coleman v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1069 (5th Dist. 1992). The party making a summary judgment motion may do so with or without affidavits. 2-1005. The party opposing the motion may file counteraffidavits, and the motion is to be granted if "...the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 2-1005. Unlike a 2-615 motion, which questions whether a complaint is sufficient to state a cause of action, a 2-1005 motion "almost necessarily assumes that a cause of action has been stated and proceeds to determine whether there are any material issues of fact to be tried." *Janes v. First Federal Savings & Loan Association*, 57 Ill. 2d 398, 406, 312 N.E.2d 605, 609 (1974).

ComEd's Amended Motion to Dismiss makes a passing reference to 2-1005, but then attempts to cover all the bases by characterizing its motion as one for "summary disposition"

with prejudice, which does not exist under the Illinois law. ComEd's Amended Motion to Dismiss creates (perhaps intentionally) ambiguity as to whether it is committing itself to 2-615 or 2-1005. Perhaps ComEd desires the ambiguity of a hybrid motion to dismiss so that it can choose one or the other, depending on how matters develop in this Docket.

But that's not what Illinois law requires.

C. Illinois Law Prohibits Hybrid Motions: Section 2-619.1

1. Separation and Identification of Motions

735 ILCS 5/2-619.1 provides as follows:

§ 2-619.1. Combined motions. Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. **A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based.**

(Emphasis added.) Contrary to the assertions in ComEd's Amended Motion to Dismiss, there is no free-style, hybrid motion for summary disposition on the merits with prejudice under Illinois law. LAZ Parking is entitled to know, and Section 2-619.1 requires ComEd to specifically and separately state, whether LAZ Parking is being asked to respond to a combined 2-615 and 2-1005 motion. If ComEd is making such a combined motion against LAZ Parking, then Section 2-619.1 requires that each motion be stated separately, rather than blended together in the opaque melange that is ComEd's Amended Motion to Dismiss.

Therefore, if ComEd is making a motion under Section 2-615 ComEd has to state that. If it is a motion under 2-1005, then it has to state that. If ComEd is moving under both of these sections, then its motion must conform to Section 2-619.1 by stating each motion in a separate part, limiting each such motion to the related statutory section, and clearly showing the grounds ComEd is relying on for the related motion. ComEd's Amended Motion to Dismiss fails utterly to comply with 2-619.1.

III. Motion to Strike Portions of ComEd's Amended Motion to Dismiss
A. Sections of ComEd's Amended Motion to Dismiss Impermissibly Place
ComEd's Judicial Admissions in Controversy and Must Be Stricken

An admission pursuant to a request to admit facts operates as a judicial admission that is considered incontrovertible and has the effect of withdrawing that fact from contention, *Moy v. Ng*, 341 Ill. App.3d 984, 988, 793 N.E.2d 919, 924 (1st Dist. 2003), *appeal denied*, 206 Ill.2d 624, 806 N.E.2d 1067, *on remand* 2004 WL 5584441. Admissions made pursuant to a request to admit are tantamount to judicial admissions and as such are taken as true, *Hoover v. Country Mut. Ins. Co.*, 363 Ill. Dec. 612, 619, 975 N.E.2d 638, 645 (Ill. App. 1st Dist. 2012). Admissions pursuant to requests to admit constitute judicial admissions, which are binding upon the party making them; they may not be controverted at trial or in a motion for summary judgment, and only in extraordinary circumstances may a party escape the consequences of a judicial admission. M. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 802.11, at 779 (7th ed. 1999), cited with approval in *Ellis v. American Family Mut. Ins. Co.*, 750 N.E.2d 1287, 1290, 255 Ill. Dec. 902, 905, 322 Ill. App.3d 1006, 1010 (Ill. App. 4th Dist. 2001). Admission through request to admit operates as judicial admission which is binding and is considered incontrovertible. *People v. Mindham*, 192 Ill. Dec. 680, 253 Ill. App.3d 792, 625 N.E.2d 835 (2nd Dist. 1993), *appeal denied*, 202 Ill. Dec. 927, 156 Ill.2d 563, 638 N.E.2d 1121.

1. Portions of Section I.1 of ComEd's Amended Motion to Dismiss Must be Stricken

As shown on page 5 of the February 13, 2014 Order, a copy of which is attached as Exhibit B to this Motion, ComEd's Admission No. 3 states:

Commonwealth Edison's claim of \$36,625.07 represented ComEd's alleged delivery services charges.

However, Section I.1 of ComEd's Amended Motion to Dismiss states as follows:

LAZ's claim of untimely unbilled charges equally lacks merit. The amount of \$36,625.07 that it claims to have paid on or about October 4, 201 [*sic*], was for its 'regular' billed service and not for any 'un-billed charges.'"

This portion of ComEd's Amended Motion to Dismiss impermissibly places in controversy a judicial admission by ComEd of record in this Docket, and it must therefore be stricken from ComEd's Amended Motion to Dismiss.

2. Portions of Section III.A.5 of ComEd's Amended Motion to Dismiss, Pg. 11, Must be Stricken

As shown on page 5 of the February 13, 2014 Order, ComEd's Admission No. 6 states:

The total amount of Commonwealth Edison's alleged unbilled delivery services charges from the Account's June 2008 billing period through the May 2010 billing period was \$259,937.85.

Despite this judicial admission by ComEd, the last several sentences of Section 3.A.5 of ComEd's Amended Motion to Dismiss, page 11, state:

According to LAZ, this document [i.e., a "re-bill" breakout by MidAmerican Energy Co.] shows that the additional ComEd delivery charges MidAm rebilled on July 12, 2010 totaled \$223,312.78 (Complaint at Par. 10).... But, the real question here is what LAZ actually paid ComEd for unbilled services charges. LAZ's documents do not answer that question with any proof.

Once again, ComEd's Amended Motion to Dismiss impermissibly places in controversy a judicial admission by ComEd of record in this Docket, and therefore the Commission must strike the foregoing sentences from ComEd's Amended Motion to Dismiss.

3. Section III.B of ComEd's Amended Motion to Dismiss, Pages 12-13, Must be Stricken

Foregoing a quotation at some length, Section III.B. of ComEd's Amended Motion to Dismiss (nearly all of page 12 and all of page 13) once again contests \$36,625.07 in ComEd charges, thus impermissibly placing ComEd's Admissions Nos. 3 and 6 in controversy. Therefore, Section III.B of ComEd's Amended Motion to Dismiss must be stricken.

4. Section III.C of ComEd's Amended Motion to Dismiss, Pages 14-18,

Must Be Stricken

ComEd, unhappy with both the ALJ's February 13, 2014 ruling on ComEd's Supreme Court Rule 216 admissions and the ALJ's denial of ComEd's subsequent request for reconsideration of that ruling, has inserted Section III.C into its Amended Motion to Dismiss as an insidious attempt to re-litigate these same issues. That the ALJ has already ruled on ComEd's judicial admissions – twice – evidently isn't good enough for ComEd, and in Section III.C ComEd tries to place those judicial admissions in controversy once again. This violates both the ALJ's two rulings in this case as well as Supreme Court Rule 216. Accordingly, the Commission must strike all of Section III.C of ComEd's Amended Motion to Dismiss.

a. Section III.C of ComEd's Amended Motion to Dismiss Violates Supreme Court Rule 216

Supreme Court Rule 216(c) provides, in relevant part, as follows:

Rule 216. Admission of Fact or of Genuineness of Documents

...

(c) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(Emphasis added.) In Section III.C of its Amended Motion to Dismiss, ComEd repeats, over and over, that each “admission is irrelevant to the ultimate issue at hand.” (ComEd Amended Motion to Dismiss, pg. 15, pars. 1 through 4). ComEd claims that its other admissions are “fatally incomplete” and “otherwise flawed.” (ComEd Amended Motion to Dismiss, pg. 16). Other admissions, according to ComEd, are merely opinions or “uncertain summaries.” (ComEd Amended Motion to Dismiss, pg. 17, par. 1). ComEd even takes the time to summarize its objections to the admissions in Section III.C.2 of its motion: “...the admissions that LAZ was able to successfully obtain...add absolutely nothing of relevant or immaterial [*sic*] fact to support either Count II or Count V of the Complaint.” (ComEd Amended Motion to Dismiss, pg. 18, last par.) ComEd uses Section III.C of its motion to question the relevance of its judicial admissions.

As the emphasized language in Supreme Court Rule 216, above, shows, if ComEd had concerns about the relevance or materiality of the admissions, then the time to raise them was within 28 days of service of the requests for admission. LAZ Parking served ComEd with the subject requests for admission on October 5, 2012. A lot more than 28 days have passed since then.

b. ComEd Cannot Place Its Judicial Admissions in Controversy

As discussed at length in Section III.A of this Motion, ComEd cannot place its judicial admissions in controversy.

ComEd relies on *Rath v. Carbondale Nursing and Rehabilitation Center, Inc.* 374 Ill. App. 3d 536 (5th Dist. 2007), *Serrano v. Rotman*, 406 Ill. App. 3d 900 (1st Dist. 2011) and *Smith v. Pavlovich*, 394 Ill. App. 3d 458 (5th Dist. 2009) as support for contesting its own judicial admissions in its Amended Motion to Dismiss. None of these cases support ComEd's position.

In *Rath*, the defendant sought to prevent the plaintiff from presenting evidence of negligent conduct because the defendant had admitted negligence in its response to a request for admission. *Rath*, 374 Ill. App. 3d, 537-39. However, the defendant had only admitted negligence during the last week of the plaintiff's residency in the nursing home. 374 Ill. App. 3d at 539. The court upheld the admission of additional evidence on negligence, stating that "a judicial admission may be cleverly made with grudging limitations or evasions... so as to be technically but not practically a waiver of proof." 374 Ill. App. 3d. at 539 (citing 9 Wigmore, *Evidence*, Section 2591 (1981)). ComEd's Supreme Court Rule 216 admissions are quite the opposite: there are no "grudging limitations or evasions" to be found in them.

Serrano v. Rotman concerned the admission of additional evidence at trial where an earlier judicial admission was found to be ambiguous at trial. *Serrano*, 406 Ill. App. 3d at 906-909. Similarly, *Smith v. Pavolovich* is completely irrelevant to this case because the plaintiff sought to make certain admissions in the defendant's answer to the complaint judicial admissions. No request for admissions under Supreme Court Rule 216 was involved.

c. ComEd Itself Admits That The Meter Constant is a Question of Fact.

In Section III.C of its Amended Motion to Dismiss, ComEd also tries to kick up dust and claim that this case hinges on the difference between “meter error” and “billing system error.” This is a herring of flaming scarlet hue. ComEd is merely trying to divert attention away from its admitted failure to test meter no. 141362866 within 90 days of installation,

ComEd even admits that the term “meter constant” is a key issue in this case: “[w]ithout question, ‘meter constant’ is a technical term and it is a term that absolutely *must* [emphasis in original] be defined in the Commission’s order for this case.” (ComEd Amended Motion to Dismiss, pg. 16; see also *id.* at pg. 5, “[t]he term ‘meter constant’ is key to this case”). Thus, ComEd admits in its motion that the term “meter constant” is a disputed issue of fact that cannot possibly be determined on the basis of pleadings and affidavits. Indeed, assuming that this Motion is granted and ComEd files a motion for summary judgment, LAZ Parking will have to depose ComEd’s affiants and other persons.

B. Affidavits Submitted by ComEd in Support of Its Amended Motion to Dismiss Fail to Meet the Requirements of Supreme Court Rule 191(a) and Must Be Stricken

The sufficiency of affidavits offered in support of or in opposition to a motion for summary judgment is governed by Supreme Court Rule 191(a). *Woolums v. Huss*, 323 Ill. App. 3d 628, 635, 257 Ill. Dec. 39, 45, 752 N.E.2d 1219, 1225, 2001 Ill. App. LEXIS 507 (4th Dist. 2001).

Illinois Supreme Court Rule 191(a) provides as follows:

“Requirements. Motions for summary judgment under section 2-1005 of the Code of Civil Procedure [735 ILCS 5/2-1005] and motions for involuntary dismissal under section 2-619 of the Code of Civil Procedure [735 ILCS 5/2-619] must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. **Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure, and affidavits submitted in connection with a motion to contest jurisdiction over the person, as provided by section 2-301 of the Code of Civil Procedure [735 ILCS 5/2-301], shall be made on the personal knowledge of the affiants; shall set forth with particularity the**

facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.” (Emphasis added).

The Illinois courts have ruled on the propriety of affidavits in support of motions for summary judgment in numerous cases. Affidavits supporting such motions that are conclusory and fail to state facts with particularity do not comply with the rule regarding summary judgment affidavits and may be stricken. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 320 Ill. Dec. 330, 382 Ill. App.3d 334, 887 N.E.2d 474 (1st Dist. 2008), *appeal denied* 325 Ill. Dec. 2, 229 Ill.2d 619, 897 N.E.2d 250. *See also Sheth v. Wunderlich*, 299 Ill. Dec. 803, 363 Ill. App.3d 252, 842 N.E.2d 1155, App. (3rd Dist. 2006), *appeal denied*, 303 Ill. Dec. 842, 219 Ill.2d 598, 852 N.E.2d 249 (paragraph in medicine committee chairperson's affidavit, which stated that if chairperson had reviewed and followed hospital bylaws he would have summarily suspended physician, did not comply with supreme court rule that provided that affidavits in support of a motion for summary judgment shall not consist of conclusions but of facts admissible in evidence); *Kavales v. City of Berwyn*, 238 Ill. Dec. 738, 305 Ill. App.3d 536, 712 N.E.2d 842 (1st Dist. 1999), *appeal denied*, 242 Ill. Dec. 139, 185 Ill.2d 629, 720 N.E.2d 1094 (deposition testimony by gas company's director of risk management, who was not employed by gas company at time of events in question, that gas company would have repaired sidewalk in a safe and consistent manner, in accordance with its common practice, after performing excavation and pipe-laying work in area of sidewalk, was a mere conclusion based on opinion of lay witness and was not based on provable facts, and thus could not be relied on in support of gas company's motion for summary judgment in action arising from pedestrian's fall on sidewalk).

The several affidavits submitted by ComEd in support of its Amended Motion to Dismiss abjectly fail to meet the requirements of Rule 191(a) in one or more respects, and therefore all or substantial portions of these affidavits and their related exhibits must be stricken.

1. The Rumsey Affidavit Fails to Meet the Requirements of Supreme Court Rule 191(a)

a. The Entire Rumsey Affidavit Must Be Stricken Because it Lacks an Attestation of Personal Knowledge

While the Rumsey Affidavit, a copy of which is attached to this Motion as Exhibit C, does state that “if called to testify, [Mr. Rumsey] would state the same as here above” (Rumsey Affidavit, par. 14), nowhere in the Rumsey Affidavit does Mr. Rumsey attest that all of the putative facts in his affidavit are based on his personal knowledge. Mr. Rumsey’s mere ability to testify about something does not make the subject of his testimony a matter of his personal knowledge. On this basis alone, the Rumsey Affidavit must be stricken in its entirety for failure to comply with Supreme Court Rule 191(a).

However, if the ALJ grants leave to ComEd to submit an amended affidavit to remedy this deficiency, then certain additional portions of the Rumsey Affidavit must be stricken for failure to comply with Supreme Court Rule 191(a). These additional portions are as follows.

b. Paragraph 3 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 3 of the Rumsey Affidavit states as follows:

Typically, ComEd brings out a CT for the customer's electrician to install. After, the customer installs the CT, a Com Ed technician will come out to the premises, install the meter and connect the CT to the meter. Generally, the customer CT cabinet and the meter liting are close to each other.

In order for a fact to be admissible in evidence, a proper foundation must be made. First, Rumsey Affidavit provides no foundation for Mr. Rumsey’s statements about what “typically” means with regard to the circumstances attending current transformer installations, nor any foundation for what may “generally” be characteristic of current transformer and meter collocation. Second, Mr. Rumsey’s statements as to what “typically” happens on installation of a current transformer, and as to where the current transformer and meter cabinet are “generally” located are not facts stated with particularity admissible in evidence, but are rather merely Mr. Rumsey’s opinions. Therefore, paragraph 3 of the Rumsey Affidavit must be stricken in its entirety.

c. Portions of Paragraph 5 of the Rumsey Affidavit Must Be Stricken

Paragraph 5 of the Rumsey Affidavit states in part that

[t]he meter constant/multiplier is not programmed into a meter. This is because, at the time it is tested for accuracy, there is no way of knowing what size C.T.s will be associated with the meter.

First, by his own admission in paragraph 9 of the Rumsey Affidavit, Elster Manufacturing programs and conducts meter accuracy tests for ComEd. Therefore, Mr. Rumsey could have no personal knowledge of what is or is not programmed into any meter, nor could he have any personal knowledge of any accuracy testing of any meter. On the face of his own affidavit, Mr. Rumsey is not competent to testify to any matters concerning meter programming or accuracy testing. Therefore, this portion of paragraph 5 of the Rumsey Affidavit must be stricken pursuant to Supreme Court Rule 191(a).

Second, Mr. Rumsey's statement that "there is no way of knowing what size C.T.s will be associated with the meter" is not a fact stated with particularity and admissible in evidence, but is rather merely his conclusion (and a speculative one at that). On this ground as well, this statement must be stricken pursuant to Supreme Court Rule 191(a).

d. Paragraph 6 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 6 of the Rumsey Affidavit states as follows:

In the LAZ Parking meter situation, 3000 amps flow to the CT, but only 5 flow through Meter No. 141362866. This means that when ComEd prepares the bill, it needs to multiply the kWh registered by the meter by 600 to bill for the actual and correct usage. Hence, for billings of actual usage, the LAZ meter requires a "constant" or multiplier of 600.

In order for a fact to be admissible in evidence, a proper foundation must be made. The Rumsey Affidavit provides no foundation for Mr. Rumsey's statements about the number of amperes flowing through the current transformer, the number of amperes flowing through the meter, what multiplier needs to be applied to the meter reading "to bill for the actual and correct

usage,” or that the LAZ Parking meter requires a “constant” or multiplier of 600. Furthermore, Mr. Rumsey’s statements about the “actual and correct usage” are mere conclusions, not facts stated with particularity that are admissible in evidence. Therefore, paragraph 6 of the Rumsey Affidavit must be stricken in its entirety.

e. Paragraph 7 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 7 of the Rumsey Affidavit states as follows:

To explain this in a different way, for every 600 kWhs consumed by the customer, only 1 kWh is registered on the meter. This is the reason that a constant, or in more simple terms, a multiplier of 600 was needed for billings on Meter No. 141362866.

As with paragraph 6 of the Rumsey Affidavit, paragraph 7 of the Rumsey Affidavit lacks any foundation for the statements made in it, and therefore it does not state a fact admissible in evidence. Accordingly, paragraph 6 of the Rumsey Affidavit must be stricken in its entirety pursuant to Supreme Court Rule 191(a).

f. Portions of Paragraph 8 of the Rumsey Affidavit Must Be Stricken

Paragraph 8 of the Rumsey Affidavit states in part as follows:

A ComEd's [*sic*] record that I can access shows that the Meter No. 141362866 was installed at LAZ's premises on December 14, 2007. (A copy is attached hereto). Installation records are not retained indefinitely....

First, Mr. Rumsey purports to rely on a ComEd record, but both his statement about that record and the record itself must be stricken because the Rumsey Affidavit fails to swear or certify as to the authenticity and accuracy of that record as required by Supreme Court Rule 191(a). Second, the Rumsey Affidavit lays no foundation for the statement of what “indefinitely” means with regard to any record retention by ComEd, and therefore this statement is not a fact stated with particularity as required by Supreme Court Rule 191(a), but rather a mere matter of Mr. Rumsey’s opinion or speculation. Therefore this portion of paragraph 8 of the Rumsey

Affidavit must be stricken.

g. Paragraph 9 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 9 of Mr. Rumsey's Affidavit states as follows:

Other ComEd records show that Elster Manufacturing conducted accuracy tests on Meter No. 141362866. It further electronically programmed each of the LAZ meters (including the subject meter) to ComEd's standards prior to shipment.

First, because Elster Manufacturing, not Mr. Rumsey, "programmed each of the LAZ meters" and "conducted accuracy tests," the statements in his affidavit violate Supreme Court Rule 191(a) because they consist entirely of alleged facts of which Mr. Rumsey could have no personal knowledge and as to which he cannot possibly attest. By his own admission Mr. Rumsey has no firsthand knowledge of the programming or accuracy testing of the meters installed at LAZ Parking's service location, and therefore any testimony by Mr. Rumsey concerning such programming or testing is inadmissible as evidence and must be stricken from the record.

Second, the Rumsey Affidavit refers to "other ComEd records," and Supreme Court Rule 191(a) requires that any affidavit used to support a motion for summary judgment must have attached thereto sworn or certified copies of all documents upon which the affiant relies. These "other ComEd records" are not attached to the Rumsey Affidavit. Moreover, Mr. Rumsey fails to swear to or certify the authenticity and accuracy of any document that is attached to his affidavit.

Third, Mr. Rumsey's statements regarding these "other ComEd records" are inadmissible as evidence because they fail to pass the Best Evidence Rule. Ill. Rules of Evid. 1002. Therefore, on each of these independent bases, Paragraph 9 of the Rumsey's Affidavit must be stricken in its entirety.

h. Paragraph 10 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 10 of the Rumsey Affidavit states as follows:

Tendered to LAZ Parking in discovery, was a meter test report for Meter No. 141362866 marked as CCLP0000099 and it is also attached to my affidavit. This business record shows that meter No.141362866 was tested by the manufacturer on 10/25/2007. The test results are: 100.01% in Full Load. 100.01% in Power Factor and 100.00 % in Light Load. This means the meter passed testing.

First, Mr. Rumsey's statements regarding the meter test report, as well as the meter test report itself, must be stricken because the Rumsey Affidavit fails to swear to or certify the authenticity and accuracy of the copy of this record. Second, Mr. Rumsey's statement that this document is a "business record" is not a fact stated with particularity but rather a legal conclusion by Mr. Rumsey that is both inadmissible as evidence and impermissible in an affidavit supporting a motion for summary judgment under Supreme Court Rule 191(a). Third, Mr. Rumsey's statement "that meter No. 141362866 was tested by the manufacturer on 10/25/2007" and the test results themselves are alleged facts of which Mr. Rumsey could have no personal knowledge and as to which he is not competent to testify, and therefore they are inadmissible as evidence and violate Supreme Court Rule 191(a). Fourth, Mr. Rumsey's statement that "[t]his means that the meter passed testing" is nothing more than a conclusion by Mr. Rumsey, and is not a fact stated with particularity and admissible in evidence that meets the requirements of Supreme Court Rule 191(a). Therefore, paragraph 10 of the Rumsey Affidavit must be stricken in its entirety.

i. Paragraph 11 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 11 of Mr. Rumsey's Affidavit states:

As explained above, however, neither meter testing nor any meter inspection would reveal the incorrectness of the meter constant (as this is a matter based on entry of current transformer data and other information into ComEd's CIMS).

This is not a fact stated with particularity and admissible in evidence, but rather is nothing more than a conclusion by Mr. Rumsey. As such, it violates the requirements of Supreme Court Rule 191(a) and therefore must be stricken in its entirety.

j. Paragraph 12 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 12 of Mr. Rumsey's Affidavit states:

I further reviewed the LAZ account records and observed that 3 - 3000:5 Amp C.T.s were entered on the account on or about 4/6/10 per the date of the attached service orders (See CCLP - 000063). This means to me that the multiplier (constant) properly went from 1 to 600 (3000 divided by = 600) shortly thereafter.

First, the "LAZ account records" and the "attached service orders" on which Mr. Rumsey purports to rely are either not attached to his affidavit or not specifically identified, and in any event Mr. Rumsey fails to swear to or certify the authenticity and accuracy of any record attached to his affidavit as required by Supreme Court Rule 191(a).

Second, Mr. Rumsey's statement that "[t]his means to me that the multiplier (constant) properly went from 1 to 600...shortly thereafter" is at once a statement of opinion (i.e., what it meant to Mr. Rumsey, but not to anyone else) and a conclusion (i.e., that the multiplier "properly" went from one number to another). Such statements are impermissible in this affidavit under Supreme Court Rule 191(a).

Therefore, under either of these grounds, paragraph 12 of the Rumsey Affidavit must be stricken in its entirety.

k. Paragraph 13 of the Rumsey Affidavit Must Be Stricken in its Entirety

Paragraph 13 of Mr. Rumsey's Affidavit states as follows:

I would expect that that [*sic*] the billings for LAZ went up significantly (but correctly) once the appropriate meter constant for this account was properly entered into the billing system.

Here ComEd once again attempts multiple violations of Supreme Court Rule 191(a).

First, being prefaced as a statement of what Mr. Rumsey “would expect” in certain circumstances, the entirety of paragraph 13 of the Rumsey Affidavit is not a fact stated with particularity and admissible in evidence, but is rather a mere matter of Mr. Rumsey’s opinion. This is impermissible in this affidavit under Supreme Court Rule 191(a).

Second, Mr. Rumsey’s statement that LAZ Parking’s billings went up “significantly” is likewise not a fact stated with particularity and admissible in evidence, but is rather a mere matter of Mr. Rumsey’s opinion. Likewise, Mr. Rumsey’s references to the “appropriate” meter constant and what was “properly” entered into ComEd’s billing system are not facts stated with particularity and admissible in evidence, but are rather merely conclusions by Mr. Rumsey that are impermissible in this affidavit under Supreme Court Rule 191(a).

Therefore, under any of these grounds paragraph 13 of the Rumsey Affidavit must be stricken in its entirety.

2. The Canestrini Affidavit Fails to Meet the Requirements of Supreme Court Rule 191(a)

The Canestrini Affidavit, a copy of which is attached as Exhibit D to this Motion, lacks any attestation of personal knowledge and therefore must be stricken in its entirety. However, should the Commission grant ComEd leave to file an amended Canestrini Affidavit, the following paragraphs and/or portions of that affidavit must be stricken.

a. Portions of Paragraph 2 of the Canestrini Affidavit Must Be Stricken

The second sentence of paragraph 2 of the Canestrini Affidavit states as follows:

“Once a correction has been made with the billing system, it should then bill correctly on its own.”

Ms. Canestrini’s statement that, after certain changes are made, ComEd’s billing system “should” bill “correctly” fails under Supreme Court Rule 191(a) because what ComEd’s system should or should not do is not a fact stated with particularity and admissible in evidence but is rather a mere conclusion or opinion by Ms. Canestrini.

Furthermore, the Canestrini Affidavit provides no foundation for the term “correctly” as used in that affidavit.

Therefore, on either of these grounds, this sentence must be stricken from the Canestrini Affidavit under Supreme Court Rule 191(a).

b. Paragraph 3 of the Canestrini Affidavit Must Be Stricken in its Entirety

Paragraph 3 of the Canestrini Affidavit states as follows:

In the course of my regular work, I reviewed a constant discrepancy report on Account No. 29310-08045 (LAZ Parking), associated with Meter No. 141362866.

In this paragraph the Canestrini Affidavit purports to rely on a “constant discrepancy report” but no such report is attached to this affidavit, or if it is attached it is not identified. Furthermore, no attachment or exhibit to the Canestrini Affidavit is sworn to or certified as to authenticity and accuracy as required by Supreme Court Rule 191(a). Paragraph 3 therefore violates Supreme Court Rule 191(a) and must be stricken in its entirety.

c. Paragraph 4 of the Canestrini Affidavit Must Be Stricken in its Entirety

As with paragraph 3 of the Canestrini Affidavit, paragraph 4 of this affidavit purports to rely on a “constant report,” but no such report is attached to this affidavit or identified, and no such exhibit is sworn to or certified as to authenticity or accuracy as required by Supreme Court Rule 191(a). Paragraph 4 therefore violates Supreme Court Rule 191(a) and must be stricken in its entirety.

d. Paragraph 6 of the Canestrini Affidavit Must Be Stricken in its Entirety

Paragraph 6 of the Canestrini Affidavit states as follows:

The technician's investigation was to verify the # of the meter, and the size, type of the equipment (current transformer) associated with that particular meter. The technician's report of this data was to be entered into CIMS a program that I access in the course of my duties.

First, by her own admission in paragraph 1 of the Canestrini Affidavit, Ms. Canestrini is a billing clerk in comed’s billing department, not a meter technician. She could have no personal knowledge of what is or is not included in a technician’s investigation, and therefore Ms.

Canestrini is not competent to testify to any of these matters.

Second, paragraph 6 of the Canestrini Affidavit purports to rely on a “technician’s report,” but no such report is attached to the Canestrini Affidavit, or if attached is not identified. Furthermore, Ms. Canestrini fails to swear to or certify the authenticity and accuracy of any exhibit or attachment to her affidavit.

Therefore, on any of these grounds paragraph 6 of the Canestrini Affidavit must be stricken in its entirety pursuant to Supreme Court Rule 191(a).

e. Paragraph 7 of the Canestrini Affidavit Must Be Stricken in its Entirety

As in previous paragraphs, paragraph 7 of the Canestrini Affidavit purports to rely on a “constant discrepancy report” and refers to an attachment. However, the Canestrini Affidavit fails to swear to or certify the authenticity and accuracy of that attachment. Paragraph 7 of the Canestrini Affidavit therefore violates Supreme Court Rule 191(a) and must be stricken in its entirety.

f. Paragraph 8 of the Canestrini Affidavit Must Be Stricken in its Entirety

Paragraph 8 of the Canestrini Affidavit states as follows:

Having verification of the CT data, I proceeded to calculate the correct constant for the subject meter. (See the attachment to my affidavit marked with Bates number CCLP 0000014 and given to LAZ Parking in discovery, for the job-aid I utilized to calculate the constant for the Meter, i.e., "Calculating Meter Constants for Recording Meters").

Paragraph 8 of the Canestrini Affidavit relies on an attachment to that affidavit, namely, a “job aid” for calculating the meter constant. In order for a fact to be admissible a proper foundation must be made. The Canestrini Affidavit provides no such foundation for the purported “job aid” on which Ms. Canestrini relies in order to make the statements in paragraph 8 of her affidavit. Furthermore, the Canestrini Affidavit neither swears to nor certifies the authenticity and accuracy of this purported “job aid.” In addition, Ms. Canestrini’s statement that she calculated the “correct” constant is not a statement of fact stated with particularity but rather is merely a conclusion by Ms. Canestrini that is prohibited by Supreme Court Rule 191(a).

Paragraph 8 of the Canestrini Affidavit therefore violates Supreme Court Rule 191(a) and must be stricken in its entirety.

g. Paragraph 9 of the Canestrini Affidavit Must Be Stricken in its Entirety

The first paragraph of paragraph 9 of the Canestrini Affidavit states as follows:

To make things clear here, a recorder meter is driven by the Kw constant, not the KWH constant. Yes, the KWH constant on Meter No. 141362866 is 600 but the kw constant is .18. A recorder meter, measures usage by pulses not by readings (cum meter). The formula used to come up with the kw constant is reflected on ComEd-Canestrini Ex. B as follows:

First, Ms. Canestrini is a billing clerk in ComEd's billing department, not a meter technician, and she could have no personal knowledge of these constants nor of the internal operation of these meters.

Second, for something to be admissible as a fact in evidence a foundation must be made. Paragraph 9 of the Canestrini Affidavit speaks about Meter No. 141362866 and then speaks about a "recorder meter." The Canestrini Affidavit makes no foundation for its use of the term "recorder meter," nor does it make any foundation for its statements on the "kw constant" as opposed to the "kWh constant" or how either of these may affect any reading taken from the meter.

Similarly, no foundation is made for the statement that "[a] recorder meter measures usage by pulses not by readings (cum meter)," without which the statement is otherwise unintelligible.

Second, paragraph 9 of the Canestrini Affidavit goes on to provide a series of calculations based on "ComEd-Canestrini Ex. B" but in addition to failing to make a foundation for this series of formulas the Canestrini Affidavit fails to make a foundation for that exhibit and fails to swear to or certify the authenticity and accuracy of that exhibit. The same flaw attends the series of calculations at the end of paragraph 9.

Therefore, paragraph 9 of the Canestrini Affidavit violates Supreme Court Rule 191(a) and must be stricken in its entirety.

h. Portions of Paragraph 10 (Misnumbered as 9) of the Canestrini Affidavit Must Be Stricken

Paragraph 10 (misnumbered as paragraph 9) of the Canestrini Affidavit states as follows:

Due to the incorrect constant of "1" instead of the corrected constant that I calculated on the basis of the verified data, my billing correction of LAZ began on May 18, 2010. It should be known that before I started making the corrections, I checked and found two other accounts for LAZ that had the same type of high usage. These were acct # 43551-65001 for 201 E Randolph, Bldg 114 and acct # 3783/-51112 for 350 E Monroe St, Bldg 113. After noting both the high usage on these accounts and the field verification, I felt comfortable making the corrections.

First, the Canestrini Affidavit's statements as to which constants are correct or incorrect are not statements of fact stated with particularity and admissible in evidence but are rather mere conclusions by Ms. Canestrini. As such, they are impermissible in the Canestrini Affidavit. Second, Ms. Canestrini's references to two other accounts that are not at issue in this Docket are irrelevant. Third, Ms. Canestrini's statement that the usage on these accounts was "high" is merely Ms. Canestrini's opinion, not a fact stated with particularity and admissible as evidence, and is therefore impermissible in this affidavit under Supreme Court Rule 191(a). Fourth, Ms. Canestrini's second statement as to the "high" usage on these two irrelevant accounts is equally objectionable for the same reason. Fifth, Ms. Canestrini's statement that she "felt comfortable" making certain changes to LAZ Parking's account is purely a matter of her subjective opinion, not a fact stated with particularity and admissible in evidence. Therefore, under any of these grounds, paragraph 10 (misnumbered as 9) of the Canestrini Affidavit must be stricken in its entirety.

i. Paragraph 12 (Misnumbered as 11) of the Canestrini Affidavit Must Be Stricken in its Entirety

Paragraph 12 (misnumbered as 11) of the Canestrini Affidavit states as follows:

While I observed that LAZ had been billed incorrectly for a longer period, i.e., beginning December 14, 2007 (when there was a meter exchange), my re-bill of LAZ was restricted to 2 years due to Section 280.100 of the Commission's rules.

These are merely the affiant's own legal conclusions as to which provisions of the Commission's regulations govern this dispute, and as such they are both inadmissible as evidence and a flagrant violation of Supreme Court Rule 191(a). Therefore, paragraph 12 (misnumbered as 11) of the Canestrini Affidavit must be stricken in its entirety.

j. Paragraph 13 (Misnumbered as 12) of the Canestrini Affidavit Must Be Stricken in its Entirety

Paragraph 13 (misnumbered as 12) of the Canestrini Affidavit states as follows:

Attached to my affidavit here is a business record provided to LAZ Parking in discovery with Bates number CCLP 0000013. It reflects, in my handwritten notations, that the total amount that LAZ Parking owed ComEd on the re-bill and for the period 6/3/08-5/5/10 was \$225,484.52. It also indicates that the original billed charges for this period (and credited) were \$44,541.37. The original billed kwh usage was 15,180 KWH hours and the rebilled KWH usage was 9,135,359 KWH hrs [*sic*]. The original billed kw usage was 21.25 and the rebilled kw usage was 14027.94.

First, Ms. Canestrini has failed to swear to or certify the authenticity and accuracy of the record she purports to rely on for these statements, i.e., Bates CCLP 13. Second, Ms. Canestrini impermissibly states her own legal conclusion that that record is "business record." This statement is thus both inadmissible as evidence and impermissible in this affidavit under Supreme Court Rule 191(a). Third, the remainder of this paragraph impermissibly purports to put in controversy the amounts allegedly owing by LAZ Parking, all of which are the subject of ComEd's judicial admissions in this Docket. Therefore, under any of these grounds paragraph 13 (misnumbered as 12) of the Canestrini Affidavit must be stricken in its entirety.

k. Paragraph 14 (Misnumbered as 13) of the Canestrini Affidavit Must Be Stricken in its Entirety

Paragraph 14 (misnumbered as 13) of the Canestrini Affidavit states as follows:

This same business record indicates the date of the meter change on December 14, 2007. Further, the data thereon shows the significant difference in usage billed both prior and subsequent to the meter change. This demonstrates the effect of the incorrect meter constant in billing after December 14, 2007.

First, the Canestrini Affidavit purports to rely on a document as to which Ms. Canestrini has failed swear to or certify its authenticity and accuracy. Second, Ms. Canestrini's statement that the record in question is a "business record" is a legal conclusion both inadmissible as evidence and violative of Supreme Court Rule 191(a). Third, Ms. Canestrini's statements about whether certain differences in usage are "significant" is not a fact stated with particularity and admissible in evidence but is rather merely her opinion, and as such is impermissible under Supreme Court Rule 191(a). Fourth, Ms. Canestrini's statement about what does or does not demonstrate the effect of a given meter constant is merely her conclusion, which is impermissible in this affidavit under Supreme Court Rule 191(a).

Therefore, under any of these grounds, paragraph 14 (misnumbered as 13) of the Canestrini Affidavit must be stricken in its entirety.

3. ComEd's Moore Affidavit Must Be Stricken

ComEd's Moore Affidavit, a copy of which is attached to this Motion as Exhibit E is fatally defective in two respects. First, the Moore Affidavit lacks any statement by the affiant that he has personal knowledge of all of the matters stated in his affidavit. Second, the Moore Affidavit purports to rely on records attached to that affidavit, but Mr. Moore fails to swear to or certify the authenticity or accuracy of any such records. Therefore, the Moore Affidavit must be stricken in its entirety under Supreme Court Rule 191(a).

4. ComEd's Jamison Affidavit Must Be Stricken

ComEd's Jamison Affidavit, a copy of which is attached as Exhibit F to this Motion, is fatally defective in that it lacks a statement by the affiant that she has personal knowledge of all of the facts stated in her affidavit. However, should the Commission grant ComEd leave to file an amended Jamison Affidavit, the following paragraphs and/or portions of that affidavit must be stricken.

a. Portions of Paragraph 4 of the Jamison Affidavit Must Be Stricken

Paragraph 4 of the Jamison Affidavit states as follows:

On May 18, 2010, ComEd issued the first re-bill associated with the "constant" correction for service from June 3, 2008 to July 2, 2008. ComEd

continued to issue re-billing through June 30, 2010. ComEd received partial payment for the outstanding balance on the account, however, not payment in full. Regular billing (with the corrected constant) resumed in July 2010. For a complete account history, please see the attachment to my affidavit which was previously provided to Complainant in discovery responses as LAZ 1.01_Attach 1 Bate number CCLP 0000006-012.

First, paragraph 4 of the Jamison Affidavit purports to rely on a record, LAZ 1.01_Attach 1 Bate number CCLP 6-012. However, in violation of Supreme Court Rule 191(a), Ms. Jamison fails to swear to or certify the authenticity and accuracy of this record. Second, Ms. Jamison uses the term “constant” twice in paragraph 4 of her affidavit but provides no foundation for what “constant” she is referring to. Without a proper foundation, a fact is not admissible in evidence. Therefore, paragraph 4 of the Jamison Affidavit must be stricken in its entirety.

b. Paragraphs 7 and 8 of the Jamison Affidavit Must Be Stricken in Their Entirety

Paragraph 7 of the Jamison Affidavit, including subparagraphs (a) through (l) thereof, and paragraph 8 of the Jamison Affidavit must be stricken because they impermissibly place in controversy the subject matter of ComEd’s judicial admissions that are of record in this Docket.

5. Portions of ComEd’s Selenica Affidavit Must Be Stricken

Although Mr. Selenica is the only one of ComEd’s affiants to attest as to his personal knowledge of the statements made in his affidavit, a copy of which is attached to this Motion as Exhibit G, he fails to swear to or certify the authenticity and accuracy of the attachment to his affidavit, and therefore all attachments to the Selenica Affidavit must be stricken.

C. Portions of ComEd’s Affidavits Must Be Stricken as Cumulative Evidence

ComEd has attached five affidavits to its Amended Motion to Dismiss. There is no limit on the number of affidavits that ComEd may submit in support of its motion; however, portions of ComEd’s affidavits are duplicative. Without limiting any other objection to ComEd’s Amended Motion to Dismiss as set forth in this Motion, Illinois Rule of Evidence 403 prohibits ComEd from ushering in a lengthy parade of witnesses to state something that another ComEd witness has already stated. More than one witness testifying to the same thing is cumulative evidence, does not add to the probative value of ComEd’s case, is prejudicial to LAZ Parking and will needlessly prolong this proceeding by wasting the Commission’s time.

1. Illinois Rule of Evidence 403

Illinois Rule of Evidence 403 provides as follows:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, **or needless presentation of cumulative evidence.**

(Emphasis added.)

2. Specific Instances of ComEd's Cumulative Evidence

Paragraph 5 of the Rumsey Affidavit states that 3000 amperes flow to the current transformer, but only 5 flow through the meter. Paragraphs 8 and 9 of the Canestrini Affidavit, including the purported calculations stated there, say the same thing.

Paragraphs 6 and 7 of the Rumsey Affidavit state that the multiplier for the meter should be 600. Paragraph 7 of the Canestrini Affidavit says the same thing.

The substance of paragraph 12 of the Rumsey Affidavit (that the multiplier for the meter should be 600) restates paragraphs 6 and 7 of his affidavit. Paragraph 7 of the Canestrini Affidavit, regarding what she refers to as the ““Should Be”” constant, says the same thing.

Paragraph 4 of the Jamison Affidavit contains statements about the May 18, 2010 rebilling of LAZ Parking's account for the period from July 2008 to May or June 2010. Paragraphs 9 and 10 of the Canestrini Affidavit say the same thing.

IV. Motion to Continue the Hearing on ComEd's Amended Motion to Dismiss

On March 11, 2015, the ALJ set a schedule for the filing of briefs on ComEd's Amended Motion to Dismiss. However, given the issues that LAZ Parking has had to raise concerning the material, and indeed fatal deficiencies in ComEd's Amended Motion to Dismiss, LAZ Parking hereby moves the Commission to continue generally the hearing on ComEd's Amended Motion to Dismiss pending the resolution of the issues raised in this Motion by LAZ Parking. In addition, should ComEd file a proper motion for summary judgment, LAZ Parking will require additional time for additional discovery and for depositions of witnesses.

V. Conclusion

Wherefore, LAZ Parking respectfully requests the Commission to enter an order:

1. Directing ComEd to amend its Amended Motion to Dismiss so as to state clearly and unambiguously whether it is a motion to dismiss under 735 ILCS 5/2-615 or a motion for summary judgment under 735 ILCS 5/2-1005; or, in the alternative, if ComEd is making a combined motion under both of these sections, directing ComEd to amend its motion so as to comply with the provisions of 735 ILCS 5/2-619.1;
2. Reaffirming that ComEd's Rule 216 admissions are judicial admissions and are incontrovertible by ComEd;
3. Striking from ComEd's Amended Motion to Dismiss, and directing ComEd to remove from any amended motion filed pursuant to this order, those portions of its Amended Motion to Dismiss and those affidavits and portions of affidavits and related exhibits identified in this Motion;
4. Requiring ComEd to make an offer of proof as to what each of its affiants is expected to state in his or her affidavit, and why such statements are not cumulative and/or irrelevant.
5. Continuing generally the hearing on ComEd's Amended Motion to Dismiss pending resolution of the issues raised by this Motion, further amendment of ComEd's motion, and for the conduct of additional discovery and depositions of witnesses; and
6. For such other relief as the Commission deems just and proper.

Dated this 14th day of May, 2015

Respectfully submitted,

By : ***Paul G. Neilan***

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